

This is a note of the discussions I've had with the tie team following the BSC letter of 13<sup>th</sup> October, our response to it and the meetings arranged with BSC for the week beginning 20<sup>th</sup> October to start addressing and resolving these issues. This note does resolve all these issues or proposes a tactic and a timetable to do so in each case. However I hope it forms a useful reference.

The issues to be tackled could fall under the following broad and interrelated headings:

- BSC engagement, empowerment and compliance with contract
- Settling SDS v26-v31 programme
- Supplementing the contract change mechanism
- Resolving urgent issues to facilitate construction start
- Base date design – 25 Nov v. Infraco Proposals v. IFC
- Other events giving rise to change since contract award

## **1 BSC engagement, empowerment, compliance with contract and behaviour**

- The most important element of the lot in my opinion. During contract negotiation we experienced BSC UK management being lacking in empowerment to make decisions. Many things we agreed between us were rejected up the chain in Germany and it made it extremely difficult to make progress. For the most part reverting directly to Germany seemed to offer us little leverage.
- Since contract we have found it very difficult indeed to engage with them commercially due to lack of resources on their side and the behaviour of those who were available – e.g. submission of vastly overstated cost estimates for any change.
- During week beginning 29<sup>th</sup> October we hope to find a more open and constructive dialogue on the large number of issues at hand as this will be the only way forward – we are engaging in the first instance with Colin Brady but must identify a constructive way of escalating without running into sand. Richard Walker goes on holiday on 26<sup>th</sup> October.
- If there is a tactic or commercial leverage/incentive by which we could force their engagement and compliance with the contract, other than invoking dispute resolution or breach, then we should come up with it soon.

## **2 Settling SDS v26-v31 programme**

- This is the one commercial area with well documented and analysed position from BSC. There is no disputing that BSC are entitled to EOT and costs as a result of the impact on their programme arising from the difference between v26 and v31 of the SDS programme for delivery of IFC. The issue is one of how the consequences are valued in terms of time and cost
- We seem to have broad agreement in terms of the time consequences – either 9 weeks delay (to the completion date of July 11) or 7.5 weeks after taking account of mitigating instructions we subsequently gave e.g. procurement of steel in advance of IFC. In a conference call with Willie last Tuesday, Richard Walker said he has a fundamental disagreement with us that any of the mitigating actions should be taken into account in valuing the v26-v31 settlement. He wants it done on a gross basis – which leaves us with no value at all for the mitigating instructions.
- On valuation the BSC estimate is for £5.3m and ours stands at £2.6m – the principal diffs being:

- BSC include for subcontractor costs as if they had been engaged in accordance with the v26 programme and the subs have therefore suffered downtime at the start or prolongation of their works as a result of delayed IFCs. We take account of the fact the subs have in fact been mobilised late and have adjusted the financial impact to reflect where there was no standing time as a result. We have difficulty assessing whether there is prolongation due to concurrent delay of their appointments and delivery of IFCs
- BSC include lump sums for Siemens costs which we do not appear to have any justification whatsoever.
- There is a overarching legal interpretation issue here in that BSC may be of the opinion they are entitled to the sub contractor costs whether they were engaged or not. Dennis is in discussion with DLA to make sure our own legal opinion stack up with the common sense of our interpretation. We should be secure about this before we engage.
- If we cannot take account of the mitigating actions then the danger is that we will struggle to get credit in terms of value at all. Same with the slow mobilisation of the sub-contractors – we may only be able to get value if we can use these delays to cover our own inadequacies (in terms of design delivery in particular) or if we levy consequential liquidated damages should they miss the contractual completion dates subsisting from time to time.
- We are aware that there may be an intra group reporting issue here in that BB UK may have reported numbers which include a value for the v26-v31 change but which Germany have discounted because it has not been agreed with us yet. This could be driving the shrill nature of the desire to get v26-v31 agreed before anything else rather than a desire to pick us off one issue at a time – I’m conjuring up faith in my fellow man here. The discussions with Colin Brady next week could bring us to a point where we will trade a fair settlement on the v26-v31 issue to get the rest of the stuff moving – If his chain gets pulled and he reverts to a “settle it or else” position then we’re back to square one and back to Walker/Flynn.
- In terms of a trade what about settling v26-v31 in return for recognition of our position on the Base date design – 25 Nov v. Infraco Proposals v. IFC at 5 below?

### **3 Supplementing the contract change mechanism**

- The history here is that both we and BSC recognised that the Infraco contract change mechanism was not effective in letting them get on with urgent work while a change goes through the contractual evaluation and agreement mechanism. From our perspective that would also include the removal of us as an obstruction to progress whether BSC are in a position to start the work on time or not. It also has to be said that a large part of the problem appears not to be the process by the timeliness with which BSC submit the estimates cost (they are allowed 18 days but I understand they often ask for an extension) or because their commercial guys have until now been in the habit of submitting vastly overstated costs making it difficult for us to agree.
- The issue has been addressed with design work where Frank and Colin Brady have agreed they can get on with design costs up to £25k per item without needing our formal agreement. This needs to be monitored and controlled by Frank and his team. If that’s effective I personally wouldn’t be too concerned about increasing the £25k limit in isolated circumstances.
- On the issue generally, Dennis came up with a simple procedure which allowed work to progress in advance of the change being formally agreed. I understand this was



handed to the BB lawyer (Ian Laing) who made it a contractual document which amended the terms of our contract.

- Dennis has been dealing with DLA on a review of the Ian Laing document (which is what BSC are awaiting for a response on per their 13<sup>th</sup> Oct letter) but I'd try to bin it and come back to a simple process outside the contract. This should include an agreement to certify and pay their reasonable costs on account in anticipation of reaching agreement on costs through the contract change mechanism. This is also to be discussed at Monday 20<sup>th</sup> meeting with Colin Brady.
- We need to explicitly recognise this process in the DARs and set an aggregate limit for payments on account.

#### **4. Resolving urgent issues to facilitate construction start**

- Frank has a number of workstreams which cannot get started for a number of reasons including the need for a fast track process in advance of the contract change mechanism (see 3 above) but also to deal with specific problems like access or design issues which are preventing start.
- I believe there are currently 26 such situations and the really big problems are structures (Russell Road retaining walls, Roseburn Street viaduct, Gogarburn Bridge, Gogarburn Landfill area, South Gyle Access Bridge, Water of Leith Bridge, Murrayfield Underpass, Baird Drive retaining wall, Carricknowe Bridge, Murrayfield Stadium tram stop. In many cases the problem is that the design does not work, or there has been redesign which is not yet complete or there are utilities such as sewers which have not been diverted and which preclude the build of the structure as designed.
- If there is a problem with the design because of a clash with utilities then in theory it goes back to SDS and therefore to BSC as the contractor. However it's a bit alarming to hear that in respect of the sewer under the South Gyle Access Bridge for instance, SDS may be claiming they relied upon survey information provided by tie (the MUDFA team) in their design. We agreed someone from Dennis's team should get a substantive paper trail on this issue to make sure we are not exposed. If SDS have cocked up element in terms of a clash with utilities then do we need to consider putting them on notice of our intention to take action?
- If the best answer to the utility clashes in terms of time and money is to get on with diverting the utilities concerned then we need to empower the team to instruct the work asap – in this regard the decision to use MUDFA, Infraco themselves or some other party needs to be dealt with.

#### **5. Base date design – 25 Nov v. Infraco Proposals v. IFC**

- Firstly there is a legal principle to be established here in terms of whether as BSC the drawings used by them to price the job (as I believe are reflected in the Infraco Proposals) are the base design for the contract or whether it is the 25 Nov drawing referred to in part 4 of the schedule to the Infraco contract. The main difference as I understand it is the extent of road works where I believe we had a capped exposure in terms of cost (£1.5m) and time (8 weeks). Dennis has taken external advice on this and is secure in our interpretation.
- Secondly there is a question of how the design developed from the base date designs up to IFC drawings. The contract price includes for 'normal design development' but the notices of change received from BSC would indicate they are going to measure each IFC drawing against the one they priced and send us a bill for the difference. However few the changes notified have been presented with a value on them yet.

- This is complicated by the fact that alarmingly there may well have been a large number changes of substance in the design leading up to IFCs which it may be difficult to classify as design development but unless I am misinformed we have no register of such changes which we can use to evaluate these in advance of a submission from one of BSCs army of commercial guys.
- We need
  - A tactic to unblock the definition of the base date designs – can we link it to v26-v31 resolution?
  - A means of identifying and evaluating in £s where we may be exposed to design changes in substance up to IFC. This should be extended to areas where we don't actually have IFC yet e.g. Picardy Place.

## **6. Other events giving rise to change since contract award**

- Logically we should be establishing a new baseline programme as at today's date and a commercial attribution of the changes between us and BSC before we move on to looking at acceleration measures which might get us back to the July 2011 date or the potential impact and cost of any new paradigms about traffic management, embargo periods or Princes Street blockades.
- The suggestion is that our respective programming and commercial staff need to work through the detail between contract awards and now step by step before the impacts can be considered in the round at a high level. This is no more than should have been happening anyway if BSC had been willing and had the staff to engage with and will put meat onto the bones of the large number of notified changes which have no time or money value associated with them.
- Two broad concerns here:
  - In the detail we get a commercial kicking because everything which is our responsibility has a time and/or cost consequence we are expected to recognise but everything that falls at their door has no immediate impact as it hasn't led to a missed sectional completion date yet and those are moving out anyway as they get EOT. We then get had again for acceleration costs to implement the measures that get back to the original completion dates. I offer no magical solution right now as how we prevent this happening if that's the game.
  - Time is of the essence here. Before the end of the year we are likely to need to present to TPB / CEC an overall picture of where the budget and programme stands both before and after the implementation of new stakeholder and traffic management restrictions. **This needs our teams to get engaged now with a deadline of end Oct to Mid Nov.**
- It would be regarded by many as failure if this is all so difficult that the only best answer to keep the project moving forward is to compromise, write a cheque and get on with it (until the next time).